

Fee Waiver Request

Freedom of Information Act request for records relating to EPA's final action on reconsideration of startup and shutdown provisions in the "MATS Rule"

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this request be waived. The legislative history of FOIA indicates that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (internal quotations and citations omitted). EIP is a national nonprofit organization dedicated to protecting the environment and reducing pollution by improving compliance with major federal environmental laws. One of EIP's main areas of focus is the Clean Air Act and power plants regulated under the Act. EIP's work combines research, reporting, and media outreach.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

I. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2).

A. The subject of the request concerns the operations and activities of the government.

EIP seeks certain records related to EPA's final action (the "Final Action") on EPA's reconsideration of the startup and shutdown provisions in the final rules titled "National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" (the "MATS Rule"), 79 Fed. Reg. 68,777 (Nov. 19, 2014). Because the Final Action is part of EPA rulemaking and is central to EPA's role as a regulator, the records EIP seeks necessarily involve the operations and activities of the government.

- B. The disclosure is likely to contribute significantly to public understanding of the government's operations or activities.

The MATS Rule is landmark rulemaking to regulate hazardous air pollutants emitted by power plants. EIP seeks records reflecting EPA's decision-making process in the Final Action regarding the point in time during plant startup when the emissions limitations from the MATS Rule apply. In fact, EPA specifically refers to one of the specific documents sought by EIP — the Technical Support Document (TSD) titled "Assessment of startup period at coal-fired electric generating units—Revised" — when discussing its decision-making process in the Final Action related to the definition of startup. *See* 79 Fed. Reg. at 68,782. EIP also seeks records reflecting EPA's decision-making process in the Final Action regarding the work practices that the MATS Rule requires plants to employ during startup. EIP plans to share the requested records with other non-profit advocacy organizations such as the Sierra Club and Earthjustice. The requested records will enable EIP, other non-profit advocacy organizations and the greater public to fully understand and assess EPA's decision-making in the Final Action and determine whether the Final Action complies with Section 112 and other relevant portions of the Clean Air Act. EIP intends to use the requested records, as appropriate, to inform the public about EPA's decision-making process in the Final Action through our website, listservs, and/or reports, all of which are available free of charge to interested parties. Other non-profit advocacy organizations with which we share the records likely will do the same. As necessary, EIP and partner organizations will also use the requested records to inform the news media — and therefore the greater public — about the Final Action.

The requested information is not already accessible through EPA's website, as EIP is only requesting actual copies of documents and information not already in the relevant docket(s). Further, EPA's activities related to the Final Action are not currently clear to the public, as evidenced by the fact that the revised TSD is not included in the relevant docket(s), even though EPA specifically refers to the revised TSD in the Federal Register notice for the Final Action. *See* 79 Fed. Reg. at 68,782. Concerned members of the public will only be able to gain a meaningful understanding of EPA's decision-making related to the Final Action if EPA discloses the requested records.

When EPA provides the requested documents, the public's understanding of EPA's decision-making in the Final Action "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." *See* 40 C.F.R. § 2.107(l)(2)(iv). Because EIP, other environmental non-profits and the public only know information about EPA's decision-making currently specifically laid out in the relevant docket(s), public understanding of the Final Action (which directly bears on EPA's efforts to protect public health and welfare related to hazardous air pollutants) will undoubtedly be enhanced to a significant extent by disclosures in response to the requests. EIP and other partner environmental non-profits can convey information of the type requested to a broad audience of interested organizations and citizens, and the increase in public understanding "compared to the level of public understanding existing prior to the disclosure" will certainly be "significant" under any reasonable interpretation of the term.

In sum, the requested documents are likely to contribute significantly to public understanding of EPA's operations and activities.

II. Obtaining the information is of no commercial interest to EIP.

The second element of the fee waiver analysis concerns the requester's "commercial interest" in the information requested. There are two relevant inquiries to determine whether the information requested is "primarily in the commercial interest of the requester," and a fee waiver is appropriate if either inquiry is satisfied. 40 C.F.R. § 2.107(l)(3). The first inquiry is whether the requester has a "commercial interest that would be furthered by disclosure." 40 C.F.R. § 2.107(l)(3)(i). Here, as a 501(c)(3) non-profit organization, EIP has no commercial, trade or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

The second inquiry concerns the requester's primary interest in the disclosure. *See* 40 C.F.R. § 2.107(l)(3)(ii). The requested materials will allow for a more thorough analysis of the Final Action and whether the Final Action is consistent with the Clean Air Act. Even if EIP did have a commercial interest in the requested materials (it does not), a complete fee waiver would be appropriate under this second inquiry because EIP's primary interest in the materials is non-commercial, i.e., to inform the public about the operations and activities of the government. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" EIP, and a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

In light of the foregoing, the requested records bear directly on identifiable operations and activities of EPA, will contribute significantly to a broad public understanding of important matters relating to government functioning and federal laws, and will not serve any commercial interest on the part of EIP. Therefore, a fee waiver is appropriate.